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In the

Supreme Court of the United States

October Term, 1994

Vernonia School District 47J,
Petitioner,

v.

Wayne Acton and Judy Acton,
guardians ad litem for James Acton,
Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

INTEREST OF *AMICUS*

The National School Boards Association

(NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands, Guam and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents the nation's 95,000 school board members, who, in turn, govern 15,173 local school districts that serve more than 40 million public school students -- approximately 90 percent of all elementary and secondary students in the nation.

The issues of drugs in the schools and maintaining a safe environment for student athletes are of major concern to school districts throughout the country, as well as to the parents of the students who are entrusted to the care of the districts.

School boards are concerned that decisions such as that of the court below will seriously undermine their ability to enforce school rules in a manner that will effectively

promote the health and safety of student athletes in the least intrusive manner possible.

ISSUE PRESENTED FOR REVIEW

Whether Petitioner's program of random drug testing of middle and high school student athletes is a constitutionally reasonable "search" under the facts and circumstances of this case.

ARGUMENT

I. Introduction.

This Court's decision in *New Jersey v. T.L.O.*, 469 U.S. 328 (1985), supporting the special need of school administrators to conduct searches of students viewed together with its decision in *Skinner v. Railway Executives Association*, 489 U.S. 602 (1989), finding a compelling government interest to conduct suspicionless drug testing of railway employees amply supports the limited drug testing program in this case. *T.L.O.* upheld a school search based on "reasonable suspicion"

without a showing of a compelling interest in safety or other reason. A suspicion of the violation of any school rule sufficiently justified a school search. *Skinner* upheld the random search of employees without individualized suspicion because of the limited expectation of privacy of these employees and the compelling state interest in protecting the public. The essential elements of both cases are present here and, therefore, justify carving out an exception to the Fourth Amendment.

II. The unique relationship between students and school officials warrants allowing drug testing of athletes where necessary to protect the students from a serious and verifiable health and safety risk.

It is well established that students do not "shed their constitutional rights at the schoolhouse door." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). But, as this Court has noted on numerous occasions, both the age of students and the nature of the mission of

schools make the environment of the public school a unique place in which constitutional rights must be viewed in a different light.

Understanding the special context of schools, this Court has recognized in a number of cases that the rights of students in the school are not necessarily coextensive with those of adults. And although public school officials are certainly state actors subject to the restraints of the U.S. Constitution, their special and unique mission calls for different rules. *New Jersey v. T.L.O.* points out that in order to maintain the "informality of the student-teacher relationship," school officials must be afforded flexibility to search students without the necessity of obtaining a search warrant or meeting a probable cause standard. 469 U.S. at 340. Similarly, *Ingraham v. Wright*, 430 U.S. 651 (1979), held that there is little need for the protection of the Eighth Amendment in the schools because "the openness of the public

school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner. . . As long as the schools are open to public scrutiny, there is no reason to believe that the common-law constraints will not effectively remedy and deter excesses such as those alleged . . . ." *Id.* at 670. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685 (1986), the Court stated that it was "perfectly appropriate" to discipline a student for the sexual innuendo in his speech to the student body in order to "make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." The Court also ruled in that case that school rules are not subject to the same scrutiny as a criminal code imposing criminal sanctions. And, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court reiterated the

proposition that "a school need not tolerate student speech that is inconsistent with its 'basic educational mission,' [citing *Fraser*] even though the government could not censor similar speech outside the school." *Id.* at 266.

The question before the Court in this case is whether the nature of the schools and their mission to educate and protect the students in their charge justify extending the *T.L.O.* standard to include searches in circumstances such as are present here, where there is a generalized suspicion that students are using drugs, but no evidence that the particular student searched is guilty of such use. In *T.L.O.* the Court held that the assistant principal's search was based on a reasonable individualized suspicion that the student had violated a school rule. The facts in that case did not necessitate a decision as to whether individualized suspicion is a necessary element of the Fourth Amendment

exception carved out in the case.

In *T.L.O.* the governmental need in conducting the search -- to enforce school rules -- was balanced with the degree of certainty that the individual searched violated those rules -- thus presenting a reasonable individualized suspicion. A number of cases have applied this standard to searches based on such conduct as: students being out of their authorized areas, *In re Bobby B.*, 218 Calif. Rptr. 253 (Cal. App. 2 Dist. 1985), *Cason v. Cook*, 810 F.2d 188 (8th Cir. 1987); student seen in the vicinity of a theft, *R.D.L. v. State*, 499 So. 2d 31 (Fla. App. 2 Dist. 1986); students exchanging money and giving evasive responses, *In re Frederick B.*, 237 Calif. Rptr. 338 (Calif. App. 1 Dist. 1987); student with history of problems seen near other students changing money, *In re Robert B.*, 218 Calif. Rptr. 337 (Calif. App. 2 Dist. 1985); student exhibiting signs of intoxication or drug use, *Shamberg v. State*,

762 P.2d 486 (Alaska App. 1988); and student with known past involvement in drug activity displaying unusual bulge in crotch of pants, *Cornfield v. School Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993). In all these circumstances, the courts found that the actions of the school officials were justified.

Although the *T.L.O.* standard has usually been applied in cases involving the adequacy of individualized suspicion, the *T.L.O.* Court made clear it was not deciding whether such particularized suspicion is always necessary to justify school searches.

> We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure [,] ... the Fourth Amendment imposes no irreducible requirement of such suspicion.' [citations omitted.]

New Jersey v. T.L.O., 469 U.S. at 342 n. 8.

In this case both courts below agreed that the school district laid a foundation for its search of student athletes but did not agree on whether that foundation was sufficient to warrant the search in the absence of a suspicion that the particular individuals searched were using drugs. In the court of appeals view, searches conducted in absence of individualized suspicion can only be justified by a "compelling" government interest which it interprets to mean under *Skinner* some catastrophic threat to public safety. It refused to find that safety of athletes was "compelling." *Amicus* believes that the interest in student safety is "compelling." *See* discussion, *infra*, at 15-21. But even if arguably the risk to the public in *Skinner* was more compelling than the risk to student athletes in this case, *amicus* contends that the environment of the schools and the nature of the relationship between student athletes and school officials supports

a holding that a drug testing program is reasonable if it is undertaken to protect student athletes from a known risk.

Courts have in fact upheld suspicionless searches in other extracurricular areas in the absence of individualized suspicion where school officials are acting *in loco parentis*. One area in particular is overnight excursions--an activity which has no counterpart outside the schools. For example, one court upheld the action of school officials supervising a voluntary band trip to Hawaii in conducting a random search of students' hotel rooms based on a general suspicion that students might have alcohol in their rooms. The plaintiff was sent home early and suspended from school after a search revealed that she had violated school rules by having a male in her room and having liquor in the next room. The court deemed it unnecessary to apply the individualized suspicion standard when supervising students

away on school trips where the likelihood of injury or misconduct by students is greater than on school premises. *Webb v. McCollough*, 828 F.2d 1151 (6th Cir. 1987). Similarly, in *Desilets v. Clearview Bd. of Educ.*, 627 A.2d 667 (N.J. Super. A.D. 1993), the court upheld a search of students' hand luggage before a voluntary field trip to a picnic and campground. The court held that "the need for close supervision in the schoolhouse is intensified on field trips where opportunities abound to elude the watchful eyes of chaperons. Administrators and teachers have a duty under state laws to protect students from the misbehavior of other students." *Id.* at 672. *Contra, Kuehn v. Renton School District No. 403*, 103 Wash. 594, 694 P.2d 1078 (1987).

III. Protection of students athletes from a known risk posed by drug use is a "compelling state interest" justifying random drug testing. In the circumstances of this case, random drug testing constitutes a "reasonable" search under the Constitution even if the Court believes that the hazards raised by this case do not match those in *Skinner* and *Von Raab*.

A. The Ninth Circuit misapplied this Court's drug testing opinions to the school setting.

The Ninth Circuit cited *T.L.O.* for the proposition that schools are allowed to search on reasonable suspicion and cited *Skinner* and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), for the proposition that testing conducted absent individualized suspicion is reasonable only where there is a "compelling state interest," such as after train accidents. *Amicus* submits that when these three cases are read together, they support the opposite conclusion from the one reached by the Ninth Circuit.

In *Skinner* this Court upheld a drug testing program of railroad employees performed routinely and without individualized suspicion after all serious train accidents. The Court accepted the government's justification for the program based on its showing that drug use in the industry is prevalent and its generalized suspicion that

accidents were caused by the drug impairment of train operators.

> In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.

489 U.S. at 624.

The Court found that the employees had a limited expectation of privacy because of their participation in a highly regulated industry and held that the government had a "compelling" interest in railway safety. In *Von Raab* the "compelling interest" of the government was in ensuring that its front line drug interdiction officers are drug free.

Therefore, outside the context of the schools, the Court has established a standard which allows random drug testing if (1) there is a reduced expectation of privacy and (2) a "compelling" interest which cannot be otherwise met. Both of these elements exist

here.

The Ninth Circuit's failure to acknowledge the presence of these two elements stems from its disregard of the special circumstances extant in the school setting which underlie this Court's decision in *T.L.O.*. Rather than taking account of the need for flexibility recognized in *T.L.O.*, the Ninth Circuit chose a course of judicial rigidity. It requires public school officials to show either a compelling state interest in protecting the general public from some disaster as in *Skinner* or that the officials have a reasonable suspicion that each student searched is guilty of an offense. *Amicus* believes that the Ninth Circuit's decision to equate a sufficient compelling safety interest solely with protection of general public safety is grossly misguided in the context of the public schools.

B. The school district had a compelling interest in protecting student athletes from a serious problem existing both nationally and in the Vernonia School District.

The issue before the Court in this case is not whether drug testing would always be reasonable in the schools, given the obvious drug problem in the country as a whole, but whether there is a reasonable relationship between the intrusiveness of the search and the specific problem sought to be addressed. In 1980 the district did not have a drug problem, and it is likely that a drug testing program designed to deter drug use would not have been reasonable at that time. But at the time the testing program was instituted, a drug problem of crisis proportions existed within the district. In situations where a school has been made aware of real dangers posed to student athletes, parents and the community expect the schools to deal with those dangers.

The school district here responded

appropriately. When school officials noticed a marked increase in discipline problems and positive attitudes among students toward drug use, they instituted drug education programs, which unfortunately proved ineffective. They also noticed that athletic injuries were increasing and suspected some of the increase may have been due to drug use. Based on this reasonable suspicion of drug use by student athletes, but with no effective way to particularize those who were using drugs *before* the occurrence of an injury, the school district decided to institute a random drug testing program in order to deter drug use and to promote the safety of student athletes. In the opinion of Dr. Robert L. DuPont, an expert on substance abuse, without the use of drug testing to determine drug-induced impairment, school teachers and administrators even with special training would still miss more than 90% of impairment caused by drugs and alcohol. R.L. DuPont, M.D., Deposition Testimony in

Acton v. Vernonia School Dist. 47J, No. 91-1154MA (April 24, 1992), at 32. Although an injury might point to a particular athlete using drugs, if the district tested only the injured students that would not be a particularized search any more than was the search in *Skinner*.

In 1989 when the school district instituted the drug testing policy, its concerns about drug use among its students were well founded; drug use among young people remains a serious problem today. According to the most recent study of drug use by secondary students by the University of Michigan for the National Institutes of Health, use of drugs is on the increase by our nation's students. National Institute of Drug Abuse, *National Survey Results on Drug Use from The Monitoring the Future Study, 1975-1993* (1994).

The state's interest in averting substance abuse by young people has special importance. According to Dr. Reed Bell,

former Director of the Office of Substance Abuse Prevention of the U.S. Department of Health and Human Services, the process of chemical dependency in young people is "extraordinarily rapid compared to an adult," so that an adolescent can become "truly addicted" in as little as four to six months. The testimony of drug expert Dr. Dupont noted other special reasons to attempt to deter drug use by adolescents. He noted, ". . .the teenage brain is going through many major changes. . .[A]bstract thinking is being developed. . .[W]hen chemicals come in that interfere with the brain during those teenage years, . . .the brain is very apt to be deflected from its normal development and have very long-term adverse effects from that drug use." DuPont Deposition Testimony, at 23-24. Furthermore, the earlier drug use begins the greater chance of lifetime chemical dependency. Bell pointed to a review of statistical data that suggests that "if we

could defer psycho-active chemical use by young people until they were 21 years of age, we would reduce the chronic addictive population by 50 percent." R. Bell, M.D., Presentation at "Alcohol and Drugs in the Public Schools: A Forum for School Leaders," (National School Boards Association, Washington, D.C., May 18-19, 1987.)

Obviously, the school's interest in deterring drug use by any of its students is a strong one for many well documented educational, social and health reasons. But even putting these reasons aside, the school's interest in deterring drug use by its athletes is even more compelling because of the potential negative effects on playing performance which could lead to serious injury. During interscholastic competition, student athletes who have ingested certain drugs could experience problems such as loss of concentration, slowed reaction time, diminished coordination, increased or

irregular heart and breathing rates, elevated body temperature, increased blood pressure and a false sense of confidence--all of which could impair playing ability and raise the risk of injury. *See* National Collegiate Athletic Association, "Drugs and the Athlete. . . a losing combination," (April 1988). Dr. DuPont noted other effects such as blocked perception of pain, impaired judgment, and difficulty in calculating distance and time relationships which also add to the risk of injury for student athletes training or playing sports under the influence of drugs. DuPont Deposition Testimony, at 41-42.

The school's interest in deterring drug use by its athletes is compelling for another reason besides the avoidance of physical injury to interscholastic sports participants. The recent NIH study in analyzing causation of drug use among young people indicated that peer pressure and student perception of risk are the most important links to drug use.

Interestingly, given the extent of drug education programs in schools, which the study indicated are also important, the study made the observation that the deaths of two athletes -- Len Bias and Don Rogers -- brought home to students the risk of even experimental or occasional use of drugs by individuals regardless of age or physical condition. University of Michigan/NIH Study at 194. *Accord* DuPont Deposition Testimony, at 18. The study also noted that after Lyle Alzado's campaign on the dangers of steroids, the use of steroids by athletes markedly decreased. *Id.* at 206. Commenting upon the effect of drug use by student leaders on the behavior of other students, Dr. DuPont noted:

> [I]t's particularly true in the middle and high school area. . .that the definition of what's desirable, the definition of how you're a winner, is made on the basis of the status of the individual in the peer group. . .[T]he leaders play a very powerful role in terms of shaping the behavior of large numbers of students in the classes. . .[W]hat they do about drugs makes an

> enormous difference about what other kids are going to do who are watching them and making up their minds about what they want to do.

DuPont Deposition Testimony, at 45-46. Thus, it is clear that the behavior of athletes does have a significant effect on drug usage by young people. *See* more discussion on this point, *infra*, at 29-32.

C. Interscholastic athletes have a lesser expectation of privacy than other students because of the extensive health, safety and training rules imposed on athletes.

The Ninth Circuit similarly misapplied this Court's rulings to the school setting to hold that a reduction in the privacy expectation sufficient to justify a random drug test exists only where the government already imposes heavy regulation similar to those applicable to the nuclear energy industry. *Amicus* contends that the concept of reduced privacy interest for student athletes should encompass a more flexible approach.

In many ways student athletes have a

lower expectation of privacy than do other students. In order to be eligible to participate in interscholastic sports, students must meet all the age, enrollment, attendance and scholastic requirements established by the state high school athletic association. *See, e.g.*, Virginia High School League, Inc. Handbook 59-70 (1994-95); Ohio High School Athletic Association Handbook 33-41 (1994-95). Before being allowed to actually engage in any training or competition, student athletes must undergo physical examinations, submit parental consent and insurance release forms and sign a copy of a student athlete policy and agreement. During the course of their athletic activities, they may be given physical therapy, be required to shower in open mass showers, be subjected to an intensive physical exercise regimen and have their physical condition monitored regularly by the school to ensure fitness to play. Student athletes also

submit to conduct rules that restrict their personal habits both in and out of school. *See* more discussion of these restrictions, *infra*, at 29-31. These students may even have to change their diets in order to meet physical requirements for participation.

Requiring athletes to submit to an additional test of their physical condition, in this case a urine test for drugs, is not unreasonable under the circumstances. In addition to ample evidence of a drug use problem in the athletic program, the school district's drug testing plan protects individual athletes' privacy to the greatest extent possible, the testing methodology is reliable and no punitive measures are taken against students who test positive. The school district is testing in order to protect the students, not to punish them.

D. Factors other than the presence of a compelling state interest should affect the determination of the reasonableness of a search in the school setting.

In the instant case the Court must look both at the context of the search and the reasons leading to the search. *T.L.O.* established that a search of a student by a school official is not subject to the same restrictions as a search by a police officer for law enforcement purposes and upheld a search based on "reasonable individualized suspicion" but without inferring that a search would necessarily be unconstitutional if supported by some other reasonable basis. *Skinner* established that, even outside the special context of the schools, a particularly invasive search, such as urine testing, would be "reasonable" if the reason for the search was shown to be "compelling," in that case to prevent train accidents and deter drug use.

All searches arguably are motivated by a desire to either prevent or deter injury or rule infractions. But in determining whether the searches are "reasonable" a number of factors should be considered: (1) who is

conducting the search -- the police, an employer or a school official; the latter has more flexibility than other government officials; (2) who is being searched -- regular citizens, employees, the student body, a special class of students such as athletes or students on an overnight trip; some of these groups of individuals have less expectation of privacy than others. For example, the Court in *Skinner* held that employees in a highly regulated industry have less expectation of privacy; (3) what degree of discretion does the government official conducting the search exercise over who within these groups will be searched; (4) where is the search being conducted -- a home, the desk of an employee, the person; dicta in *T.L.O.* indicates that the more intrusive the search, the more need for judicial scrutiny; (5) why is the search being conducted (what is the object of the search) -- to obtain evidence of a crime, to protect the public from a known

provable risk of harm, or to protect the individual searched from a known provable risk of harm; *Skinner* allowed an intrusive search without individualized suspicion because the reason for the search was so compelling; (6) are there other equally effective means to achieve the government's end that are less intrusive; and (7) are there penalties imposed for refusal to submit to the search or where evidence of wrongdoing is found. The penalties may shed some light on whether the government is motivated by safety concerns or a desire to punish. Various commutations of these factors may produce a variety of judicial results. Such judicial flexibility better reflects the balance between the rights of individual students against the school's interest in promoting a safe academic and athletic environment than the Ninth Circuit's narrow interpretation of this Court's drug testing opinions.

IV. Student athletes stand in a different position in the student body than other students.

A. There is no state or federal constitutional right or legal compulsion to participate in athletics and thus eligibility rules need only be rationally related to a legitimate state interest.

The Ninth Circuit Court of Appeals, based on its findings that participation in school athletics is highly desirable and encouraged by parents and that organized sports are part of the educational process for which tax dollars pay, transformed student participation in athletics from a privilege into a right that students who do not wish to be tested for drugs should not have to forfeit. It should be noted that this judicial elevation in status occurred without citation of any supporting precedents.

In 1986 this Court dismissed for want of a substantial federal question a Texas Supreme Court case holding that students do not possess a constitutionally protected interest in their participation in extracurricular

activities. *Stamos v. Spring Branch I.S.D.*, 695 S.W.2d 556 (Tex. 1985), *appeal dismissed*, 475 U.S. 1001 (1986). That case involved the constitutionality of Texas' "no pass no play" rule requiring students to maintain a certain academic average in order to be eligible for extracurricular activities. The Texas Supreme Court held that the rule was rationally related to the state interest in encouraging minimum levels of academic performance.

Similarly, the drug testing program at issue here is an eligibility requirement that is rationally related to the legitimate state interest in discouraging drug use by students and promoting health and safety of student athletes. This is not an arbitrary requirement based on some generalized notion that athletes should be drug free, without evidence that the eligibility rule would further that interest. Everyone, including both courts below, agrees that there is a drug problem in Vernonia School District with which

the district has attempted to deal through education programs. But that effort has fallen far short, and the district has chosen with good reason to institute a proven technique for deterring and detecting drug use.

Just as students have no constitutionally protected right to participate, they are subject to no legal compulsion to participate. Students participate in athletics voluntarily. If they do not want to be subjected to a reasonable search to determine whether they are drug free, they simply do not have to participate.

B. Athletes are role models for other students and anti-drug rules for athletes serve an important symbolic role for other students.

"Courts have historically allowed school officials a great deal of latitude in the development and enforcement of good conduct rules, insofar as continued eligibility for activities is concerned, because students

engaged in school activities are viewed as school leaders and representatives of the school." L. Bartlett, *The Courts' View of Good Conduct Rules for High School Student Athletes*, 82 Educ. L. Rep. 1087 (West Pub. 1993). Courts have upheld drug and alcohol policies directed toward athletes, accepting the argument of school policy makers that such policies were adopted as a symbol to the community that drugs will not be tolerated and to maintain high standards for athletes in order to instill discipline in other students. *See, e.g., Bush v. Dassel-Cokato Bd. of Educ.*, 745 F. Supp. 562 (D. Minn. 1990).

Some commentators have argued that the courts should not accept statements of school officials without evidence that such policies work. Bartlett, at 1101-03. Here, there is both general and specific evidence that such policies work. The NIH/University of Michigan study indicated that the incidence of drug use by secondary students went down after reports

about the adverse effects of drug use by nationally recognized athletes. *See* discussion, *supra*, at 20-21. It is well recognized that student athletes can also serve as role models to other youth because of the respect they command in the school and the community. Their drug-free performance on the field and positive life style outside the athletic arena serves to reinforce a no-use message among other young people. *See* S. Milburn & S. Smith, "Your Student Athletes Can Help Prevent AOD (Alcohol and Other Drug) Use," *Student Assistance Journal* (Nov./Dec. 1992).

Similarly, the district court noted in this case that Vernonia "is typified by its central interest in school district activities in general and athletics in particular." 796 F.Supp. 1354. Citing expert testimony, the district court found that athletes "are role models for the entire community" and a random drug testing program can have "significant

deterrent effects . . on a youthful population." *Id.* at 1363. And, after implementation of the drug testing program in Vernonia, disciplinary reports returned to "normal" levels, and there were no reports of athletic injuries attributable to drug or alcohol use. *Id.* at 1368.

In *Von Raab*, Justice Scalia disagreed with the "exercise in symbolism" of the majority opinion primarily because of the lack of factual basis for the testing program in that case. However, Justice Scalia joined the *Skinner* decision because of the demonstrated frequency of drug and alcohol use by the targeted class of employees and "the demonstrated connection between such use and grave harm . . ." Certainly, both of these elements are present in the case at bar. In addition, it has been shown here that the testing program has had a positive effect on the rest of the student body because of the unique role played by athletes in the

community.

V. State tort laws require schools to protect student athletes from foreseeable dangers. Where drug use is evident in a school athletic program, drug testing is an effective means of preventing injury.

State tort laws provide remedies for the negligent supervision of interscholastic sports programs. These laws place on districts the duty to be aware of reasonably foreseeable dangers and to take measures to reduce the risk of injury. The duty extends to appropriate instruction of student athletes, supplying and maintaining suitable equipment, properly maintaining grounds and facilities, hiring and maintaining adequately trained coaching and personnel, providing adequate athlete health care, adopting and enforcing safety rules and providing adequate supervision. *See, e.g., Vargo v. Svitchon*, 100 Mich. App. 809, 301 N.W.2d 1 (1980) (no reasonable safety precautions to minimize injuries, failure to supervise coach); *Leahy v. School Board of Hernando County*, 450 So.2d

883 (Fla. App. 1984) (failure to provide enough helmets and mouthguards during contact drills); *Woodring v. Board of Education of Manhasset Union Free School Dist.*, 79 A.D.2d 1022, 435 N.Y.S.2d 52 (1981) (improper installation and maintenance of railing around gymnasium running track); and *Clark v. State*, 276 App.Div. 10, 93 N.Y.S.2d 283 (1949) (failure to provide adequate medical assistance in sports program).

Where the school district is aware of drug use in the athletic program and suspects that injuries have been caused by such drug use, it would seem reasonable for the district to institute a program to reduce that risk. Where drug education has been found to be ineffective, such as in the instant case, drug testing is an appropriate way to protect students.

Schools are expected to deal with potential dangers in athletic equipment, facilities, etc. Is it really so different

for the schools to take steps to prevent injuries from the danger of drugs?

The district court after detailing the enormous scope of the drug problem in Vernonia's athletic program speculated: "I cannot help but wonder what liability defendant might have faced had it failed to take the next step in combatting the drug and alcohol problem when confronted with such clear evidence that students were abusing drugs and alcohol and engaging in sports." 796 F. Supp. at 1364.

Conclusion

The Vernonia School District has clearly established that its random drug testing program for student athletes was a reasonable search under the facts and circumstances of this case. The testing program balanced the privacy interests of student athletes, which are diminished because of the nature of sports and the high degree of regulation of athletic activities to protect the participants, with

the compelling interest of the school in carrying out the public mandate to protect its students. No one factor in this case should be viewed alone; taken in their totality all these elements--the voluntary aspect of athletic participation, the inherent safety risks of athletics, the documented proof that a drug problem existed in the program, the documented proof that athletes are role models and an effective drug abuse program will affect the safety of all the students, the potential for tort liability in absence of protection from known risks--show that the drug testing undertaken in the Vernonia School District is a reasonable search under the Constitution.

Amicus submits that the decision of the Ninth Circuit below should be reversed.

Respectfully submitted,

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